No.

In the

Supreme Court of the United States

OCTOBER TERM, 1959

JOANNE MAE SCHULTETUS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

AERO ENTERPRISES, INC., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Joanne Mae Schultetus, a widow, individually and as next friend of Douglas Jay Schultetus, a minor, American Flyers, Inc., Aero Enterprises, Inc., and Delores Senn, individually and as next friend for John Edward Senn and Kathy Anita Senn, minors, pray that

a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered April 18, 1960 (Petition for Rehearing in said cause having been denied on May 17, 1960).

I.

REPORT OF THE OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court for the Northern District of Texas (R. 894-912) is reported in *167 F. Supp. 239*. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 1051-1064), printed in Appendix A hereto, infra, pages 27-40, is reported in *277 Fed. 2d 322*.

II.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals for the Fifth Circuit was entered April 18, 1960 (R. 1065 & 1066; Appendix B, infra, pages 41, 43). Rehearing was denied on May 17, 1960 (R. 1082, Appendix B, infra, page 45). The jurisdiction of this Court is invoked under *28 U. S. C. Section 1254(1)*.

III.

QUESTIONS PRESENTED

(1) Whether or not the United States Government is liable under the provisions of the Federal Tort Claims

Act, for the negligence of duly authorized CAA personnel in the operation of air traffic control towers under VFR (Visual Flight Rule) conditions.

(2) Whether or not duly authorized CAA control tower operators are primarily responsible for the operation of aircraft within the air traffic control zone under VFR conditions.

(3) Whether or not the primary responsibility for the operation of aircraft within the CAA air traffic control zone under VFR conditions is upon the pilot.

IV.

STATEMENT

The claims of all Petitioners emanate from a collision of two training aircraft about one-half (½) mile North of Meacham Field located in the City of Fort Worth, Tarrant County, Texas. The field was owned by the City of Fort Worth and at the time of the accident in question, served as a facility for commercial and private aircraft, including schools of instruction for flight training. At all times material to this case, the Civil Aeronautics Authority (CAA) maintained and operated a control tower for the supervision of all air traffic within a designated control zone.

The collision occurred on April 9, 1957, at 12:12 o'clock p.m. The weather was clear, visibility unlimited, with the sun shining from the South at an elevation of seventy degrees (70°) and the wind blowing from the southeast at

approximately twelve (12) knots per hour. Both aircraft were on a routine training mission and it is undisputed that both were well within the defined limits of the CAA control zone and under the direct supervision, control and observation of the control tower.

To better understand the sequence of events leading to the untimely collision, reference is made to a plat of Meacham Field shown at page 934 of the Record. Pertinent to this litigation are runways 17 (170°) and 13 (130°). On the day in question, runway 13 was in use for all routine take-offs and landings (i. e., all aircraft would take off and land in a southeasterly direction). The aircraft involved were of the lightweight variety, and therefore, the prescribed traffic pattern, as denoted by the plat, was the small rectangular pattern within the larger circular pattern. A plane flying this rectangular pattern for runway 13 should take off in a southeasterly direction and climb to an altitude of four hundred feet (400'); make a ninety degree (90°) left turn, and climb to six hundred feet (600') (the cross wind leg); make a second ninety degree (90°) left turn maintaining the same altitude and proceeding in the opposite direction from that of take-off and parallel to the take-off runway (the downwind leg); make a third ninety degree (90°) left turn (the base leg) and then make a fourth ninety degree (90°) left turn onto final approach for landing on the same runway. In short, it is a generally prescribed rectangular pattern at specific altitudes.

On the day in question, runway 17 (170°) was used for *practice or simulated* instrument approaches only inasmuch as this runway was the only one equipped with the necessary navigational facilities to accomplish this type of maneuver. Attention is called to the plat at page 894 of the record which reflects the runway layout of Meacham Field, and also encompasses the instrument approach range for landing on runway 17 could be used for making this type of practice approach. According to CAA regulations, a plane making an *actual or practice instrument* landing would begin its approach at seven hundred feet (700') over the radio range located 2.1 miles North of runway 17 and continue inbound in an attitude of gradual descent until making touch down on the runway in question. The *simulated or practice* instrument approach is a procedure by which the student pilot wears a special type goggle and the windshield on his side of the plane is covered with a colored plastic material, the combined effect of which makes it impossible for the student pilot to see outside of the aircraft, but possible for him to see his flight and navigation instruments. The instructor pilot seated on the right has normal vision from *his* side of the plane. The colliding aircraft, (Cessna 140), however, approached from the left side of the plane.

At this point, by looking at the plats referred to, it is more than obvious even to the casual observer, that a line projected from the radio range to runway 17 would, of necessity, cross a line depicting the downwind leg for runway 13, (See prescribed traffic pattern R. 934), and two

aircraft reaching the intersection of the two lines at the same time and at the same altitude would collide. Thus, under the circumstances of this case as noted below, clearances given the two aircraft *without further warning to alter or change course* obviously resulted in the collision of the two planes.

Shortly prior to the collision, a Cessna 170, one of the planes involved, was given clearance by the control tower by voice radio to make a simulated or practice instrument approach for runway 17. This plane was owned by Petitioner American Flyers, Inc., and was occupied by pilot instructor Schultetus and student pilot Rattunde. Also, shortly prior to the collision, and at a time when the Cessna 170 was approaching the radio range from the North for the practice instrument approach, the control tower cleared at least three Cessna 140's for take-off on runway 13. The first Cessna 140 cleared by the tower was owned by Petitioner Aero Enterprises, Inc. and was occupied by instructor pilot Senn and student pilot Chambers, and was the other plane involved in the collision. At the time of the collision *all three Cessna 140's*, which had been cleared by the tower minutes before, were at various positions on the downwind leg for runway 13 as reflected by the plat, *one behind the other and all at 600 feet.* The Senn aircraft and the aircraft immediately following it was not equipped with a functioning radio nor was one required. These two aircraft were controlled from the CAA tower by light signals.

When the Senn aircraft (Cessna 140) was well into the downwind leg, the Cessna 170, as it passed over the middle marker, (See plat referred to above), transmitted to the tower "missed approach" and immediately commenced a fifteen degree (15°) climb, from four hundred feet (400'), which was standard procedure. Seconds later the Cessna 170 and the Cessna 140 collided at an altitude of six hundred feet (600') and fell in the approximate positions as indicated by "X" on the plat shown at page 934 of the Record. Both aircraft were demolished and all occupants instantly killed. At the time of the collision there were three Cessna 140's on the downwind leg and according to the first incident report filed by the Civil Aeronautics Authority's investigators, the two aircraft involved in the accident had been on a collision course (R. 935). Although chief tower operator Ellis testified as to advices, so-called, given by radio transmission to the Cessna 170 concerning a Cessna 140, no advice, so-called, was given as to the fact that there were three Cessna 140's on the downwind leg and as to which one he had reference. Furthermore, realizing that the two aircraft were on a converging and collision course, none of the three tower operators gave any warning, by light signal or otherwise, to the Cessna 140 prior to the collision in question. It is undisputed that the chief controller failed to instruct the Cessna 170 to alter its course so as to avoid the possibility of a collision at any time while the aircraft were on a collision course. It is also undisputed that at the time of the accident, (1) the control tower was staffed by three CAA qualified control

operators, (2) the chief operator was in radio communication with the Cessna 170, (3) the tower was equipped with necessary light guns for communication with the other aircraft, and (4) all operators witnessed the events leading up to the collision and the aircraft involved, but no warning was given to the Cessna 140.

Mrs. Joanne Mae Schultetus, widow of instructor-pilot John Kenneth Schultetus, filed suit on her own behalf and for her minor child, Douglas Jay Schultetus, against the United States, under the applicable provisions of the Federal Tort Claims Act, supra, and Aero Enterprises, Inc., as co-defendants. Plaintiff alleged various acts of negligence on the part of the CAA control tower operators and pilot Senn, employee of Aero Enterprises, and that such acts were the proximate cause of her husband's death. Plaintiff prayed for judgment against all defendants, jointly and severally (R. 24-39). The United States and Aero Enterprises, Inc., cross-claimed against each other for indemnity and contribution (R. 64, 68-73), and the Ohio Casualty Insurance Company intervened as subrogee in the amount of workmen's compensation paid for the death of Schultetus (R. 81-84).

Thereafter, Mrs. Delores Senn, widow of instructor-pilot John Edward Senn, filed suit in her own behalf and for her two minor children against the United States, under the provisions of *28 U. S. C. 1346(b)*, and *28 U. S. C. 2671, et seq. (Tort Claims Act)*. Co-plaintiffs in the action were Madie Jane Senn, mother of deceased pilot Senn, and Aero Enterprises, Inc., the latter plaintiff suing for the value of

the Cessna 140. Also named as defendant by Delores Senn and Madie Jane Senn was American Flyers, Inc. Plaintiffs alleged various acts on the part of the CAA control tower operators and the pilot of the Cessna 170, as being negligence and the proximate cause of the injuries and damages complained of, and prayed judgment against each defendant, jointly and severally (A. E. R. 4-19). American Flyers cross-claimed against the United States for indemnity and against the United States and Aero Enterprises, jointly, for the value of its aircraft (A. E. R. 33-37). The United States likewise cross-claimed against American Flyers, Inc., for indemnity and contribution (A. E. R. 49-53).

On May 26, 1958, after having been consolidated for trial purposes, the cases were tried before the Court without a jury. Thereafter, judgment was entered for all plaintiffs against the United States of America, from which judgment the Government appealed to the Court of Appeals of the United States, Fifth Circuit. The opinion and judgment of the District Court is reported in *167 F. Supp. 239*. The Trial Court, in its Special Findings as to negligence, found:

(a) That the pilots of the Cessna 140 and Cessna 170 were not guilty of any acts of negligence and that they were exercising ordinary care for their own safety at the time and on the occasion of said accident and no evidence was introduced sufficient to overcome said presumption

(b) At all times subsequent to the clearance of the Cessna 170 for the simulated instrument approach there

were two (or more) Cessna 140 aircraft on the downwind leg for runway 13.

(c) The control tower operator cleared the Cessna 170 for a practice instrument approach for landing on runway 17 with knowledge that there were other aircraft on the downwind leg for runway 13.

(d) That the operator in charge of the control tower failed to inform the Cessna 170 of the presence of more than one Cessna 140 aircraft which were on a converging or collision course with it and failed to identify which Cessna 140 that he had reference to in directing any warnings given the Cessna 170.

(e) The tower operator failed to instruct the Cessna 170 to alter its course so as to avoid the possibility of collision with the Cessna 140.

(f) The tower operator failed to give a warning light signal to the Cessna 140 to give way to the Cessna 170, and further, failed to give a general warning light signal to the Cessna 140 to warn it of the presence of the Cessna 170.

On April 18, 1960, the United States Court of Appeals for the Fifth Circuit reversed the Trial Court and held that:

(1) The District Court erred in placing upon the operators of control towers the primary responsibility for the operation of aircraft and not recognizing certain Governmental regulations which have assigned this responsibility to the operators of aircraft.

(2) The operation of control tower and the duties of the operators of the control tower are merely advisory and the primary responsibility for the operation of aircraft is upon the pilots under VFR (Visual Flight Rules) conditions.

(3) The District Court had an erroneous concept of the functions and duties of the operators of the control tower.

(4) The District Court's findings were clearly erroneous with reference to there being two or more Cessna 140's on the downwind leg preparatory to landing on runway 13.

(5) There was no actionable negligence on the part of the tower operators in failing to give or attempting to give light signals to the Cessna 140.

V.

REASONS FOR GRANTING THE WRIT

Direct Conflict With Holding of This Court

(1) The decision of the Fifth Circuit Court of Appeals in this case is directly contrary to that of this Court in the case of *Eastern Air Lines v. Union Trust Company* and *United States of America v. Union Trust Company, 221 Fed. 2d 62, affirmed 350 U. S. 907, 100 L. Ed. 796, 76 Sup. Ct. Rep. 192.*

The facts of the *Eastern Air Lines* case are almost identical in many respects with those of the case now before this Court. In the *Eastern Air Lines* case, a Bolivian P-38 type plane collided with a Commercial DC-4 owned by Eastern Air Lines within the air traffic control zone of the Washington National Airport. The case against East-

ern was tried before the jury and the case against the United States was tried before the Court. The jury found Eastern negligent and assessed damages; the trial court found the United States likewise negligent and assessed damages. The Court of Appeals reversed as to Eastern but *affirmed* as to the United States. This Honorable Court then likewise *affirmed* as to the liability of the United States but reversed in part as to Eastern. It is interesting to note that the United States *did not prevail* before any forum in which the case was tried.

In the *Eastern Air Lines* case, the two aircraft were within the air traffic control zone at the Washington National Airport and "at all times in question, weather conditions at and near the airport were excellent and visibility unimpeded", (VFR conditions), *221 Fed. 2d 79*. Actually, as in the case at bar, the sequence of events transpired within the view of the control tower operators. The evidence showed that both planes were within the traffic pattern and at the time of the collision both had turned on to final approach, one behind the other. Seconds later, the P-38 crashed into the DC-4 from above and behind, both planes falling to the ground and killing all occupants except the P-38 pilot.

In the *Eastern Air Lines* case, the Trial Court found:

> "* * * As to negligence, I find that there was failure of the control tower personnel to issue a timely warning to the Eastern plane as to the P-38 being on final approach; in the failure, also, to warn the P-38 that Eastern was on final approach; in clearing both planes for the same runway at approximately the same time,

> having in mind their respective positions in relation to each other and the speed of both their approach and descent; *and the failure to keep both planes advised as to the activities of the other;* • • •" (Emphasis ours.)

The Trial Court in the case at bar made findings *as to almost identical acts of negligence* on the part of the control tower operators, as heretofore pointed out, pages 9, 10, supra.

The Fifth Circuit Court of Appeals, when it reversed the case at bar, in effect overruled the *Eastern Air Lines* case, supra, when it stated that:

> *"It is apparent that the District Court had an erroneous concept of the functions and duties of the operators of the control tower."* (Emphasis ours.)

That Court further held in the case at bar that it was the direct and primary responsibility of the pilots of the aircraft to avoid collision with other planes and "that the direct and primary responsibility for the operation of aircraft over or in the vicinity of an airport rests upon the pilots of the aircraft."

To the contrary however, there is no hint of primary or secondary responsibility in the *Eastern Air Lines* case because in that case it was said that:

> "It is, therefore, our opinion that if a government tower man negligently clears two planes to land on the same runway at the same time or is guilty of some other negligent act or omission in doing his work, the government is liable for resulting injury in the same manner and for the same reason that it is liable for injury done by a driver of a mail truck who, in exer-

> cising discretion as to how to drive negligently runs through a red traffic light." *221 Fed. 2d 78.*

The Fifth Circuit Court of Appeals attempts to make a distinction between visual flight rule (VFR) and instrument flight rule (IFR) conditions regarding tower operations. Yet no such distinction was made in the *Eastern Air Lines* case. In the *Eastern Air Lines* case the Trial Court further found:

> "4. For an adequate period of time before the collision, both planes were visible to the control tower personnel who observed said planes and knew that said planes were on converging approaches for landing on runway 3, and said personnel had an adequate opportunity to give timely warnings and instructions *to each plane*." *(221 Fed. 2d 79.)* (Emphasis ours.)
>
> "c. 'they failed to keep *both planes* advised of the activities of the other'." *(221 Fed. 2d 79.)* (Emphasis ours.)

It should be noted that emphasis is placed upon *each plane and both planes being notified*, not merely one plane.

In direct conflict therewith, the Fifth Circuit Court in its opinion continually refers to the fact that the Cessna 170 having been warned, there was no duty to warn the Cessna 140 in spite of the Civil Air Regulations and the law as stated by this Court in the *Eastern Air Lines* case to the contrary. The Trial Court found negligence on the part of the tower operators in failing to give or attempting to give visual light signals to the Cessna 140. The Fifth Circuit Court, however, determined that such finding was clearly erroneous. In light of the *Eastern Air Lines* case, how can the two decisions be reconciled?

Further, the similarity is revealed in that in the *Eastern Air Lines* case, as in our case, there was a finding of negligence on the part of the tower operators as to their failure to identify the aircraft referred to in their radio transmissions. This is set forth on pages 66 and 67 of the *Eastern Air Lines* opinion as follows:

> "Having been told by the tower he was No. 2 to land on runway 3 and having seen, as he thought, that the plane which was No. 1 to land on that runway had already done so and had taxied away, Bridoux concluded it was unnecessary for him to check with the tower to learn whether the plane ahead of him had landed. We reproduce in the margin his testimony that he regarded the tower's statement, 'You are No. 2 to land on runway 3,' an absolute clearance to land after he had decided for himself, without further communication with or from the tower, that the No. 1 plane was out of the way."

In the case at bar the CAA investigator testified without contradiction that since there were two or possibly three Cessna 140's on the downwind leg, then the pilot of the Cessna 170 could have become confused as to which Cessna 140 the tower had reference to in its warning, (R. 525). It is undisputed that the tower advised of only one Cessna 140 and the Trial Court found that:

> "the operator in charge of the control tower failed to inform the Cessna 170 aircraft by radio of the presence of more than one Cessna 140 aircraft which were on a converging or collision course with the Cessna 170 (59 Victor); and failed to identify which Cessna 140 he was referred to in directing any warnings given to the Cessna 170 (59 Victor)."

The facts and findings of both cases are identical, yet the result of the decision of the Fifth Circuit Court is direct conflict with that of the Supreme Court of the United States.

Furthermore, there is a similarity in this case and the *Eastern Air Lines* case in that as a practical matter, the tower operator gave clearance to both planes when they were on a converging or collision course, because by necessity, the clearance of the Cessna 170 meant that it would have to cross the path of the Cessna 140 on the downwind leg for runway 13.

The Fifth Circuit Court substituted its opinion for that of the Trial Court as to evidence, references to aircraft, what a pilot had in his mind, ability to see when looking over your shoulder, and numerous other matters; all contrary to the Trial Court's findings.

The conclusions raised by the Fifth Circuit Court concerning the warnings of the tower operator, and its interpretation as which particular Cessna 140 the pilot of the Cessna 170 had in mind, should be gravely considered in light of the fact that the pilots of both planes are dead, and as stated in *Eastern Air Lines* case on page 72 of the opinion, consideration should be given that neither pilot was bent on self-destruction:

> "The negative testimony is weakened further by the fact that, because of the human instinct of self-preservation and the disposition of men to avoid personal harm. Eastern's dead pilots are presumed to have acted with diligence and due care."

Needless to say the conclusion of the Fifth Circuit Court is not only contrary to the law and Rules of Civil Procedure, but it is also in violation of the *Eastern Air Lines* case in which it was said:

> *"We cannot substitute judgment on a factual issue for that of the trial judge simply because we might have reached a different conclusion." (221 Fed. 2d 79-80.)* (Emphasis ours.)

It should be noted further that the Fifth Circuit opinion completely fails to discuss the *Eastern Air Lines* case, but its ruling obviously attempts to distinguish, limit and nearly obliterate the responsibilities and duties of tower operators, contrary to such duties and responsibilities as approved by this Court in the *Eastern Air Lines* case. This situation is one of the reasons for granting a writ of certiorari as is provided by Rule 19 of the Supreme Court Rule which reads in part as follows:

> "1. A review on writ of certiorarí is not a matter of right, but on sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(b) Where a court of appeals * * * has decided a federal question in a way in conflict with applicable decisions of this Court * * *."

Certainly you have a situation in this case where the Fifth Circuit Court of Appeals has taken upon itself to overrule the *Eastern Air Lines* case and has in effect relieved the United States Government for the negligence of CAA con-

trol tower operators. To accept the decision of that Court will render the term "control tower" meaningless for there will be no control.

Contrary to the Meaning and Effect of Rule 52(a) of the Federal Rules of Civil Procedure

(2) Since its inception, much has been said by many able jurists throughout the land concerning the meaning and effect of *Rule 52(a)*, of the *Federal Rules of Civil Procedure*. The Books are replete with cases which have turned on this one rule and its ever present mandate that "* * * findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Labeled by some writers as the "Unless Clearly Erroneous" doctrine, it has been held time and time again that the Appellate Court, upon review, will not retry issues of fact or substitute its judgment with respect to such issues for that of the Trial Court. To cite cases reflecting various interpretations of the rule would serve no useful purpose here, as each case must turn upon its individual set of facts. We can only point up to this Court the very obvious apparent contradictions in the testimony and say that each finding of fact by the Trial Judge was based upon his opportunity to observe the demeanor of the witnesses while testifying, to appraise their credibility and to determine the weight to be given to their testimony.

By way of illustration, the Fifth Circuit Court reached the conclusion that the operators of the tower and the operators of the Cessna 170 both had reference to the same aircraft in their radio communications with each other. However, we respectfully point out to this Court that there is not one word of testimony, nor is there the slightest inference in the record to indicate which aircraft the operators of the Cessna 170 had reference to inasmuch as both were killed in the collision (i. e., the tower operator supposedly warned of a "Cessna 140" and the pilot of the Cessna 170 supposedly acknowledged by radio transmission "have him in sight". The Trial Court found that there were three Cessna 140's in the specific area, any one of which the pilot of the Cessna 170 could have observed). In fact, the government's own witness as heretofore pointed out, testified without contradiction that the pilot of the Cessna 170 could have been confused as to which Cessna 140 the tower operator was referring to (R. 525). Incredible as it may be, the Fifth Circuit Court brushed aside the Trial Court's findings and said that the tower and the Cessna 170 were referring to the same aircraft.

The Fifth Circuit Court said further that the second Cessna 140 was not far enough along on the downwind leg to have been the plane to which the Cessna 170 referred in acknowledging the warnings of the control tower. However, we call this Court's attention to the very positive and uncontradicted testimony of an eye-witness to the accident.

This witness, an occupant of the second Cessna 140, demonstrated to the Trial Court with the aid of a plat of Meacham Field, his exact position on the downwind leg at the time of the collision (R. 278).

In these instances and in many other instances throughout the trial of this case, the trial judge had the benefit of observing the demeanor of the witnesses and to judge their credibility. The mere fact that the Fifth Circuit Court disagrees with the conclusions reached is not grounds for reversal if the views of this Court in the *Eastern Air Lines* case are to be observed.

The Fifth Circuit Court repeatedly stated that the trial court was clearly erroneous and that the tower operators were not confronted with a situation which imposed a duty to warn the Cessna 140 by light signals. Yet, this Court in the *Eastern Air Lines* case held that both aircraft prior to the collision should have been notified by the tower when on a converging or collision course. It is uncontradicated that the two aircraft in question in this case were on a collision course and that no attempt was made by the operators of the tower to prevent the very act that they were trained to prevent.

Throughout the record of this case there is more than ample testimony to support the findings of the Trial Court with reference to the negligence of the tower operators. Because the Fifth Circuit Court of Appeals disagrees with

the conclusions reached, it saw fit to invade the province of *Rule 52(a)* of the *Federal Rules of Civil Procedure* and step beyond the limits of this well defined rule of law by retrying the issues of act and substituting its own judgment with respect to such issues for those of the Trial Court.

Importance of the Question

(3) The question presented by this case, simply stated, is: Does the responsibility for the operation of aircraft within an airport traffic control zone lie with each individual pilot or with the centrally located control tower? The Fifth Circuit Court of Appeals has said the pilot, whereas, the Supreme Court of the United States has said the control tower. The importance of such a question cannot be over-emphasized with the jet age upon us and the space age over the horizon. Needless to say, a clear cut standard of responsibility is urgently needed for the protection of the lives and property of the American people. The United States Government pre-empted the field of aviation long ago with the advent of the Civil Aeronautics Act of 1938, *52 Stat. 973, 49 U. S. C. 401*, which act authorized the formation of the Civil Aeronautics Board (CAB) and the Civil Aeronautics Administration (CAA). [Since this case was tried, Congress enacted the Federal Aviation Act of 1958, *72 Stat. 731, 49 U. S. C. A. 1301*, which act abolished the CAA and created a new executive organization known as the Federal Aviation Agency (FAA)].

After the creation of the CAA, voluminous rules and regulations were adopted setting up the facilities and personnel for the regulation and protection of air traffic, including the important control tower facility maintained by its duly certified operators. It is interesting to note that throughout its history, the CAA would had one believe that its rules and regulations are *advisory* only, yet, a violation thereof gives rise to an incident report with possible civil or criminal penalty (R. 727). In other words, the CAA has enjoyed the envious position of saying that the pilot is ultimately responsible for the safety of his plane and thereby assuming no liability for the negligence of its own employees, but conversely punishing any offender for violation of any so-called advisory instructions given by the same employee. If the ruling of the Fifth Circuit is followed, the term "control tower" is a misnomer. It should be advisory tower. Obviously, such a position is untenable.

The first year of the Jet Age saw the airlines pull away from railroads and bus lines in domestic inter-city, passenger-mile competition. A poor third in this competition just ten years ago, the airlines now account for 47.3% of the total common carrier traffic. At the current rate of increase, the airlines in 1960 will surpass the combined total of train and bus passenger miles in this market.

It is estimated that in 1959, 56 domestic air lines carried 55,875,000 passengers, flew some 36.3 *billion* passenger

miles and served 721 American cities with 1,908 aircraft. The number of passengers flown in 1959 represented an increase of approximately 5,000,000 over the previous year of 1958.

The archaic notion of sole pilot responsibility might well have been adequate at the time of the creation of the CAA and prior to World War II. At that time, private aviation was in its infancy and had not yet begun to flex its jet-powered muscles to outer space and such instruments as radar, gyro compass, and the like were still on the drawing boards. Twenty years ago, the air space above the United States appeared adequate with less than 20,000 planes within the air and few of them capable of speeds faster than 150 miles per hour. Today it is estimated that 109,500 planes are flying the the same air space, many of them at tremendous speeds in excess of sound. Of this number it is estimated that 69.5% are represented by the General Aviation Fleet (Private) which figure does not include military or commercial type operations.

Indeed, the crowded air space problem will become more acute with each passing year as the number of planes and their speeds increase. The responsibility for the safety of the national flying public must be settled, otherwise, it is conceivable that aircraft will fly about the country in aimless confusion and without central control as the tower operators stand by to issue a casual advisory and hope for the best.

CONCLUSION

Petitioners therefore respectfully urge that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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By
PAUL J. SEDGWICK

CERTIFICATE OF SERVICE

Petitioners, Joanne Mae Schultetus, a widow, individually and as next friend of Douglas Jay Schultetus, a minor, American Flyers, Inc., Aero Enterprises, Inc., and Delores Senn, individually and as next friend for John Edward Senn and Kathy Anita Senn, minors, served Respondent, United States of America, with three copies of the Petitioner's Petition for Writ of Certiorari in accordance with Rule 33, Subsections 1 and 3(b), by depositing copies of such Brief in the United States Post Office at Washington, D. C., postage prepaid, addressed to Counsel of Record for Respondent, George Cochran Doub, Assistant Attorney General, Civil Division, United States Department of Justice, Washington, D. C., W. B. West, III, United States Attorney, Federal Building, Fort Worth, Texas; Morton Hollander and Howard E. Shapiro, Attorneys, Department of Justice, Washington 25, D. C., sending three copies of such Brief to each of them on the day of July, 1960, in accordance with Section 1 and 3 (b) of Rule 33 of the Revised Rules of the Supreme Court of the United States.

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Attorney of Record for Petitioners.

APPENDIX A

OPINION OF THE COURT BELOW

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17712

UNITED STATES OF AMERICA,

Appellant,

versus

JOANNE MAE SCHUETETUS, a Widow, Individually and as next friend of DOUGLAS JAY SCHUETETUS, a minor, *et al.*,

Appellees.

No. 17713

UNITED STATES OF AMERICA,

Appellant,

versus

AERO ENTERPRISES, INC., *et al.*,

Appellees.

Appeals from the United States District Court for the Northern District of Texas.

(April 18, 1960)

Before HUTCHESON, JONES and WISDOM, Circuit Judges.

JONES, Circuit Judge: These cases arose out of a collision of airplanes over Meacham Field at Fort Worth, Texas. This field is owned and operated by the City of Fort Worth. It is used by all types of aircraft for various purposes but it is not generally used by commercial airlines operating on scheduled flights. There are three large runways on the field, of which only two require reference. Runway 17 runs in a north-south direction (178 South), and it is crossed by Runway 13 which runs in a northwest-southeast direction (130 Southeast). Flight operations at the field were directed from a control tower operated by employees of the Civil Aeronautics Administration, an agency of the United States, herein called CAA. The collision occurred a few minutes after noon on April 9, 1957. The sun was shining and a moderate wind was blowing from the southeast. The two aircraft involved in the collision were owned by separate flying schools. One of these aircraft, a Cessna 170, frequently identified in the testimony as 59 Victor, was owned by American Flyers, Inc. It was in charge of instructor pilot Schultetus who had with him student pilot Rattunde. The other plane was a Cessna 140 which was owned by Aero Enterprises, Inc., and at the time of the collision it was operated by instructor pilot John Louis Senn and student pilot C. P. Chambers. All four occupants of the aircraft were killed in the collision.

Aero Enterprises, Senn's widow for herself and her minor children, and Senn's mother, brought suit against American Flyers and the United States. It was asserted

that the pilots of the Cessna 170 were negligent in operating the plane and that the United States was negligent in the giving of improper signals and in failing to give proper signals from the control tower, and that the negligence so alleged was the cause of the collision. American Flyers cross-claimed against Aero Enterprises and the United States for the value of its Cessna 170, making similar allegations of negligence against Aero Enterprises as the plaintiffs had made against it, and making like charges against the United States. American Flyers also cross-claimed against the United States of indemnity, and the United States cross-claimed against American Flyers for indemnity or contribution. The widow of Schultetus for herself and her minor child brought suit against Aero Enterprises and the United States asserting negligence liability for the death of her husband. Aero Enterprises cross-claimed against the United States which cross-claimed against Aero Enterprises, each making protective claims for indemnity or contribution. The Ohio Casualty Insurance Company intervened to recover workmen's compensation benefits paid for the death of Schultetus.

The two cases were consolidated for trial. The district court found that there was no negligence in the operation of either of the aircraft. It found that the CAA employees were negligent in what they did and in what they failed to do, and that their negligence was the cause of the collision with the resulting loss of life and property. Judgments aggregating $147,000 were entered against the United

States. The district court's opinion is reported in 167 F. Supp. 239. The United States has appealed in each case and the appeals were consolidated. These proceedings do not involve any claims from the death of either of the student pilots.

Shortly before the collision the Cessna 140 took off on Runway 13 to the southeast and into the wind. This plane was engaged in making practice landings. This plane was radio equipped but the radio was not in operation. No radio was required in the activity of the Cessna 140. The routine of such procedure was to climb from the take-off to a 400-foot altitude, make a left turn to the crosswind leg and climb to 600 feet, turn left again to a downwind course parallel with Runway 13 for an appropriate distance, then make another left turn into the so-called base leg and from it turn into the runway approach for a landing. Two other Cessna 140's took off after the Senn-piloted aircraft. One of these had aboard instructor pilot George A. Schlarman and student pilot Marvin Brown. The other Cessna 140 was being flown by Pete B. Dennis.

The Cessna 170 was coming in from the north to make a simulated instrument landing on Runway 17. Rattunde, the student, was taking instruction instrument flying. His side of the windshield was covered with a transparent amber shield and his eyes were covered with polaroid goggles, so that he could see the instrument panel in the plane but could not see through the windshield. The visibility of his instructor was not, and was not permitted to be, restricted or impaired. As the Cessna 170 approached, the Cessna 140

had turned into its northwest or downwind course, flying at 600 feet. The Cessna 170 requested the control tower to clear it for a simulated instrument landing. The clearance was given and with the clearance a warning was given that there was "Traffic, Cessna 140 East of the field, downwind for Runway 13." A brief interval later the tower again warned the Cessna 170 of "Traffic, Cessna 140 downwind East of the field for Runway 13," and asked "Do you have him in sight?" The Cessna 170 replied, "I have him in sight." As the Cessna 170 came over the "middle marker" radio facility, about six-tenths of a mile from the end of Runway 17, at an altitude of 400 feet, it transmitted "missed approach," and began climbing. The tower gave another warning, "Cessna crossing in front of you." Calvin Ellis, the Senior Controller at the tower, heard an acknowledgment. As the Cessna 170 began its climb it made a turn to the left[1] and in a matter of seconds the Cessna 170 came up to and struck the Cessna 140.

The district court found that each of the aircraft was on a proper course and altitude at the time of the collision and that there was no negligence on the part of the operator of either of the aircraft. It was found that there were two or more Cessna 140's on the downwind leg and that the tower operators were negligent in failing to warn the Cassna 170 of the presence of more than one and in failing, in the warnings, to identify the Cessna 140 referred to. The district court found that the operators of

[1] The making of a turn by the Cessna 170 is in dispute. The district court found that such a turn was made. The evidence permits, if it does not require, such finding.

the control tower negligently failed to instruct the Cessna 170 to alter its course so as to avoid the collision, and likewise negligently failed to give red light signals to the Cessna 140 directing it to give way to the Cessna 170. It was also held that the tower operators negligently failed to maintain proper control over the two aircraft so that each would be properly spaced. The acts of the operators of the control tower, so found to be negligent, were determined by the district court to be the proximate cause of the collision and of all the damage resulting therefrom. 167 F. Supp. 239, 245-246. The findings and conclusions of the district court are challenged by the United States.

Liability growing out of the operation of aircraft is to be determined by the ordinary rules of negligence and due care. *King v. United States*, 5th Cir. 1949, 178 F. 2d 320; 6 Am. Jur. 38 et seq, Aviation §64. The applicable law, under the Federal Tort Claims Act, 28 U.S.C.A. § 1346(b), is that of Texas. The well-settled negligence rule in Texas is that "The ability to have foreseen and prevented the harm is determinative of responsibility." 30B Tex. Jur. 179, Negligence, § 8. But, as this Court has said. " • • • it is not required that the particular accident complained of should have been foreseen. All that is required is 'that the injury be of such a general character as might reasonably have been anticipated; and that the injured party should be so situated with relation to the wrongful act that injury to him or to one similarly situated might reasonably have been foreseen.' " *International Derrick & Equipment Co. v. Croix*, 5th Cir. 1957, 241 F. 2d

216, 221, cert. den. 354 U. S. 910, 77 S. Ct. 1296, 1 L. Ed. 2d 1428.

It is the position of the United States that the district court committed error in determining that the acts of the operators of the control tower were negligent, and the proximate cause of the collision and of the damage resulting from it. The Government contends that the court was in error in determining that the Cessna 170 was not negligent in making the left turn that brought it into collision with the Cessna 140.

It is required that, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses," Rule 52(a) Fed. Rules Civ. Proc., 28 U.S.C.A. This Court, discussing Rule 52(a) has said,

> "Under that rule, as it plainly reads and has been interpreted by the courts, it is not for the appellate court to substitute its judgment on disputed issues of fact for that of the trial court where there is substantial credible evidence to support the finding. It may reverse, though, under the rule (1) where the findings are without substantial evidence to support them; (2) where the court misapprehended the effect of the evidence; and (3) if, though there is evidence which is credible would be substantial, the force and effect of the testimony considered as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case." *Sanders v. Leech*, 5th Cir. 1946, 158 F. 2d 486, 487. See *United States v. Gypsum Co.*, 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746; *Williams v. United States*, 5th Cir. 1958, 252 F. 2d 887; *Manufacturers Casualty Insurance Co.*

v. Intrusion-Prepakt, Inc., 5th Cir. 1959, 264 F. 2d 758; *Neil v. Commissioner of Internal Revenue*, 5th Cir. 1959, 269 F. 2d 563.

The Government attacks the district court's findings that there were two or more Cessna 140's on the downwind leg for Runway 13; and that the control tower negligently failed to warn the Cessna 170 of the presence of more than one and failed to indicate which of the Cessna 140's was referred to in the warnings. Of the two Cessna 140's which followed the one involved in the collision, the first to take off was in charge of pilot Schlarman who was giving instructions to student pilot Brown. This plane flew an extended course on taking off. It had, perhaps, completed its crosswind leg and started downwind before the collision and even before the warnings. The confusing and conflicting evidence would support such finding as was made. But, having flown the extended take-off leg this plane was not far enough along on the downwind leg to have been the plane to which the Cessna 170 referred in acknowledging the control tower's final warning of "Cessna crossing in front of you."

The last of the Cessna 140's to take off from Runway 13 was piloted by Dennis who was practicing solo flying. He was some distance behind Schlarman and, by his testimony, had just rolled into the downwind leg when the collision occurred. There is nothing in the evidence that justifies the inference that the operators of the Cessna 170 could have regarded it as the Cessna 140 which it acknowledged that it had in sight. Although there were witnesses who voiced the opinion that the operators of the Cessna 170

might have believed that the warnings from the control tower referred to the Schlarman or Dennis aircraft, such opinions could only have been based on speculation and conjecture. We cannot escape the deduction that the only well-founded determination of which the facts will admit, is that both the operators of the tower and the operators of the Cessna 170 had reference to the Cessna 140, which was in the collision, in the giving by the one and the acknowledging by the other of the warnings. The district court's findings, then, we find to be clearly erroneous.

It seems apparent that the district court had an erroneous concept of the functions and duties of the operators of the control tower. This is manifested in its finding, so called, that the operator at the control tower was negligent in failing to instruct the Cessna 170 to alter its course so as to avoid the possibility of collision with aircraft in the traffic pattern of Runway 13. The duties and responsibilities of air traffic control personnel have been set forth in a joint manual called the A N C Manual, issued by the Army, Navy, Air Force, Coast Guard and C A A. The control tower is charged with the responsibility "for the issuance of clearances and information to pilots of aircraft for the purpose of preventing collision between: ... Aircraft in the traffic pattern, and landing and taking off at the landing area." A N C Manual, Rev. 2d Ed., p. 29, § 3.000. So too it is provided that, "When flying in visual flight rule weather conditions it is considered the direct responsibility of the pilot to avoid collision with other aircraft. Under such conditions, the information and clearances is-

sued by the control tower are intended to aid pilots to the fullest extent in avoiding collisions." Id. § 3.010. The Civil Air Regulations of the Civil Aeronautics Board provide that "The pilot in command of the aircraft shall be directly responsible for its operation and shall have final authority as to operation of the aircraft." 14 C.F.R. § 60.2. The airport traffic control procedures have been thus summarized.

> "All aeronautical activities at any airport, or landing area, and all flying of aircraft departing from or arriving at an airport which constitutes a control area or control zone, must be conducted in conformity with the current pertinent provisions of the Civil Air Regulations.
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> • • • • •
>
> "When flying in visual flight rule weather conditions, (regardless of the type flight plan or air traffic clearance), it is the direct responsibility of the pilot to avoid collision with other aircraft. Under such conditions, the information and clearances issued by the control tower are intended to aid pilots to the fullest extent in avoiding collisions. In this connection a clearance issued by a tower (such as 'cleared to land') either by radio or visual signal is permissive in nature and does not relieve the pilot from exercising a reasonable degree of caution in executing the provisions of the clearance. However, such clearances will not be issued unless, in the opinion of the tower, the anticipated action can be safely completed from a collision hazard standpoint if reasonable caution is exercised by the pilot, Speizer, Preparation Manual for Aviation Negligence Cases 397.

The information given by radio from the tower to the Cessna 170, as to the presence of the Cessna 140, culminating in the warning, "Traffic, Cessna crossing in front of you," was in full discharge of the responsibility of the

tower to give information for preventing collision between aircraft. The theory followed by the district court would place upon the operators of control towers the primary responsibility for the operation of aircraft at the field. Governmental regulations, having the force of law,[2] have assigned this responsibility to the operators of aircraft.

What we have just said applies with no inconsiderable force to the so-called findings of the district court that the tower operator negligently failed to give visual light signals to the Cessna 140. A steady red light signal means, "Give way to other aircraft and continue circling." An alternating red and green light signal is a "General Warning Signal" means "Exercise Extreme Caution." The district court decided that the tower should have given the Cessna 140 the steady red "give way" signal after the Cessna 170 had been cleared for a simulated instrument approach. At this time and thereafter those in the tower, by their radio contracts with the Cessna 170, believed and were entitled to believe that if the Cessna 140 maintained its course, which it did, the Cessna 170 would avoid it. The tower operator, at this time, was not confronted with a situation which imposed a duty to attempt to warn the Cessna 140 by a signal light.

The district court also reached the determination that the tower should have given the Cessna 140 a general warning signal to warn it of the presence of the Cessna 170 after the tower operator had observed the aircraft were on a converging or collision course. It might be noted at this

[2] 49 U.S.C.A. §§ 551, 560(a)(5), 1421, 1430 (a)(5); Allegheny Airlines v. Village of Cedarhurst, 2nd Cir. 1956, 238 F. 2d 812.

point that by the time there might have been any thought of using a general warning signal light, the Cessna 140 had passed the tower and those in it would have had to look backward to have seen any signal. The Cessna 140 was doing routine training flying and it is not suggested that there were any reasons other than the normal hazards of flying for the Cessna 140 to anticipate that it would be signaled. The tower operator, to be sure, could have hoped and perhaps expected that such a signal then given would be seen. He could also have hoped but perhaps not have expected that a general warning then given would have alerted the Cessna to the danger then present or then developing and avoided the collision. The tower operator believed and was entitled to believe that the Cessna 170 saw the Cessna 140 crossing in front of it and that it would keep clear. The tower operator was entitled to believe that the operator of the Cessna 170 would, in the exercise of his direct and primary responsibility, avoid a collision with another plane, the presence of which he had acknowledged. There was no actionable negligence on the part of the tower operator in failing to give, or in attempting to give, visual light signals to the Cessna 140. The determination to the contrary by the district court is, we think, clearly erroneous.

What we have said also disposes of the so-called finding that the tower operators negligently failed to maintain control over the two aircraft so that each would be properly spaced so as to avoid collision. Here again the district court has overlooked the principal that the direct and

primary responsibility for the operation of aircraft over or in the vicinity of an airport rests upon the pilots of the aircraft. We are of the belief that in this respect also the district court was in error.

It may be that there is a greater duty and responsibility upon the control tower to aircraft operating under instrument flight rules than under visual flight rules, and in such a situation a lesser responsibility rests upon the pilot.[4] Although flying a simulated approach the Cessna 170 was operating under visual flight rules. As has been said, ability of the instructor pilot to see was not impaired. Whatever may be the duty of the tower to a plane operating under instrument flight rules, we have no doubt but that the duty of the tower to the two aircraft involved in the collision and to those flying in them was fully discharged. We do not say that cases may not arise where the United States will be liable by reason of negligence of control tower operators for damages arising from the collision of aircraft. We are convinced that this is not such a case. Those findings of the district court which we decide are clearly erroneous, were either without substantial eviden-

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"An airport traffic control tower is responsible for the insurance of clearances and information to pilots of aircraft for the purpose of preventing collision between:

* * * *

"Aircraft operating under instrument flight rules after control of such aircraft has been delegated to the tower by the appropriate air route traffic control center." ANC Manual, Rev. 2d Ed. p. 29, § 3.000.

[4] "When flying in instrument flight rules weather conditions it is obviously impossible for the pilot to assume the responsibility of avoiding collision with other aircraft except as directed by the ground control agency. Therefore, it is of the utmost importance that all clearances issued by a control tower to pilots of aircraft under its jurisdiction be adequate, concise and definite inasmuch as the pilot has no other means of ascertaining the proximity of other aircraft." ANC Manual, Rev. 2d Ed. p. 29, § 3.011.

tiary support or based upon misapprehensions of the effect of the evidence.

The United States urges with much vigor that the operators of the Cessna 170 were negligent in failing to maintain a proper course that would have kept it out of the course of the Cessna 140, and in failing to heed the warnings given from the tower. Having reached the conclusion that the Government must prevail on its appeal because no actionable negligence attributable to it has been shown, it becomes unnecessary for us to consider questions as to the negligent operation of the Cessna 170.

The judgments of the district court are reversed and judgments are here rendered for the United States, and the cause is remanded for further proceedings not inconsistent herewith.

REVERSED AND REMANDED.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By /s CLARA R. JAMES
Deputy

New Orleans, Louisiana
June 13, 1960

APPENDIX B

JUDGMENTS AND ORDERS OF THE COURTS BELOW

JUDGMENT.

Extract from the Minutes of April 18, 1960.

No. 17712

UNITED STATES OF AMERICA,

versus

JOANNE MAE SCHULTETUS, a Widow, Individually and as next friend of DOUGLAS JAY SCHULTETUS, a minor, *et al.*,

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, reversed and judgments are here rendered for the United States; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

* * * * *

JUDGMENT

Extract from the Minutes of April 18, 1960.

No. 17713

UNITED STATES OF AMERICA,

Appellant,

versus

AERO ENTERPRISES, INC., *et al.*,

Appellees.

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* * * * *

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17712

UNITED STATES OF AMERICA,

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versus

AERO ENTERPRISES, INC., *et al.*,

Appellees.

Appeals from the United States District Court for the Northern District of Texas.

Before HUTCHESON, JONES and WISDOM, Circuit Judges.

PER CURIAM:

IT IS ORDERED That the petition for rehearing in the above entitled and numbered causes be, and it is hereby DENIED.

Extract from the Minutes of May 17, 1960.